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WOLLMUTH MAHER & DEUTSCH LLP
500 FIFTH AVENUE
NEW YORK, NEW YORK 10110

TELEPHONE (212) 382-3300
FACSIMILE (212) 382-0050

January 9, 2020

MEMO ENDORSED

By ECF

The Honorable Barbara C. Moses
United States Magistrate Judge
United States District Court for the Southern District of New York
500 Pearl Street, Room 20A
New York, New York 10007

Case: *Commerzbank AG v. The Bank of New York Mellon, et al.*, No. 15-cv-10029
Subject: Request for Reconsideration of 1/6/2020 Order (ECF 320)

Dear Judge Moses:

We write to ask the Court to reconsider its January 6, 2020 Order (ECF 320) declining to rule on Commerzbank's November 28, 2018 challenges to BNYM's privilege log (ECF 169), despite ruling on BNYM's challenges to Commerzbank's logs (ECF 167), because of the pending motions for summary judgment, as well as the instructions for reactivating the motion after decision on those motions.

Although we understand the considerations of complexity and economy that drove the Court's decision, the withheld documents may be relevant to the issues presented in the summary judgment motions. It is unfair to permit BNYM to withhold documents (and to obtain the benefit of such withholding on the pending motions) if, as we assert, the withheld documents are not privileged and should have been produced in discovery long before the summary judgment motions were briefed. Moreover, because Commerzbank has not seen the withheld documents, it would be difficult for Commerzbank to identify which withheld documents are relevant to the claims and defenses remaining to be tried or to select which of its challenges it continues to press after the summary judgment motions. The production of previously withheld documents after the Court has ruled on summary judgment could theoretically require reopening summary judgment—which, we submit, would be the most inefficient result of all. Therefore, the existence of pending motions does not appear to us to be a reason to defer decision on timely privilege challenges concerning documents that might be relevant to those motions.

In short, although we share the Court's desire to proceed economically, we respectfully submit that, if unprivileged documents have been wrongfully withheld that are relevant to the summary judgment issues, they should be produced now, when they might still impact the decision on the motions, not later, after the motions have been decided.

Very respectfully,

/s/ Philip R. Schatz

Philip R. Schatz

Plaintiff's request for reconsideration is DENIED for substantially the reasons set forth in defendants' letter dated January 10, 2020.

SO ORDERED.



Barbara Moses, U.S.M.J.
January 15, 2020